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IN THE

Supreme Court of the United States

OCTOBER TERM—1976

No. 76-207

JOSEPH G. SZIMA,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTION PRESENTED	2
CONSTITUTIONAL AMENDMENT AND STATE RULE INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	12

APPENDIX:

A—Opinion of the Supreme Court of New Jersey	1a
B—Opinion of the New Jersey Superior Court, Appellate Division	20a
C—Opinion of the New Jersey Superior Court, Law Division (April 19, 1974)	26a
D—Indictment	36a
E—Order dated April 26, 1974	39a
F—Order dated May 30, 1974	41a

Cases Cited

Barker v. Wingo, 407 U. S. 514, 33 L. Ed. 2d 101 (1972)	8-12

PAGE

Dillingham v. United States, —— U. S. ——, 46 L. Ed. 2d 205 (1975) 9

Moore v. Arizona, 414 U. S. 25, 38 L. Ed. 2d 183 (1973) 9

United States v. Hanna, 347 F. Supp. 1010 (D. Del. 1972) 10

United States v. Marion, 404 U. S. 307, 30 L. Ed. 2d 468 (1971) 9, 10

United States v. West, 504 F. 2d 253 (D. C. Cir. 1974) 10

United States Constitution Cited

Sixth Amendment 2-5, 8

Statute Cited

28 U.S.C.:

Sec. 1257(3) 2

Rule Cited

New Jersey Court Rules (1969):

3:25-3 ..... 3, 6, 11

IN THE

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No.

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STATE OF NEW JERSEY,

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PETITION FOR A WRIT OF CERTIORARI TO THE NEW JERSEY SUPREME COURT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Joseph G. Szima, petitions for a Writ of Certiorari to review the final judgment of the New Jersey Supreme Court which reversed the unanimous judgment of the Superior Court of New Jersey, Appellate Division, and thereby reinstated the judgment of conviction in the Superior Court of New Jersey, Law Division.

Opinions Below

The majority and dissenting opinions of the New Jersey Supreme Court are reported in 70 N. J. 196, —— A. 2d —— (1976). See Appendix A, infra, pp. 1a to 19a. The opinion of the Supreme Court of New Jersey, Appellate Division, is reported in 133 N. J. Super. 469, —— A. 2d —— (1975). See Appendix B, infra, pp. 20a to 25a.

The oral opinion of the Superior Court of New Jersey, Law Division, denying petitioner's motion to dismiss the indictment is set forth in Appendix C, infra, pp. 26a to 35a. It was not reported.

Jurisdiction

The final judgment of the New Jersey Supreme Court was entered May 17, 1976. See Appendix A, infra, p. 1a *et seq.* This petition for certiorari was filed less than ninety (90) days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Question Presented

Whether a twenty-three (23) month delay between arrest (charge and arraignment) and presentment of indictment to petitioner without any explanation or reason for delay by the State, and where the State had all the information it required for return of an indictment at the time of arrest, denied the petitioner his constitutional right to a speedy trial under the Sixth Amendment to the Constitution of the United States.

Constitutional Amendment and State Rule Involved

United States Constitution, Amendment VI, provides in pertinent part as follows:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation . . ."

R. 3:25-3 of the *New Jersey Court Rules,* 1969, reads as follows:

> "If there is unnecessary delay in presenting the charge to a grand jury or in filing an accusation against a defendant who has been held to answer upon a complaint, the Assignment Judge may dismiss the complaint on his or the defendant's motion."

Statement of the Case

As a result of information received from an alleged reliable informant, information obtained from an independent investigation by police authorities and information available by reason of an authorized taped interception of petitioner's private residence telephone, a warrant to search petitioner's home was issued on February 4, 1972. Execution on said warrant and petitioner's arrest took place on February 4, 1972. Petitioner was charged with unlawful bookmaking and arraigned on said charge in the Municipal Court of the City of Garfield, New Jersey, on February 11, 1972.

In January of 1974, some twenty-three (23) months later, petitioner was noticed by the State of New Jersey that an indictment had been returned by the grand jury against him. See Appendix D, infra, pp. 36a to 38a.

It is an undisputed fact that at the time of petitioner's arrest in February, 1972, the State had all the information available to it for the purpose of making a presentation to the grand jury regarding petitioner's alleged criminal conduct. Further investigation by the State was neither conducted nor necessary.

In April of 1974 petitioner moved before the Superior Court of New Jersey, Law Division, to dismiss the indictment against petitioner on the grounds that he was denied his right to a speedy trial as guaranteed by the Sixth Amendment to the United States Constitution. The State filed no reply documents and offered no excuse for the twenty-three (23) month delay at the hearing on the return date of said motion. The motion was denied. See Appendix C, infra, pp. 33a to 35a. The Order of denial was entered on April 26, 1974. See Appendix E, infra, p. 39a.

On May 9, 1974, petitioner moved before the Superior Court of New Jersey, Appellate Division, for leave to take an interlocutory appeal on the Order of April 26, 1974. Petitioner's application was denied on May 30, 1974. See Appendix F, infra, p. 41a.

Petitioner's case came on for trial on June 24, 1974, at which time petitioner stood trial for the sole purpose of preserving his right to appeal the April 26, 1974 ruling on the Sixth Amendment issue. A judgment of conviction was entered on the First, Second and Fourth Counts of the indictment. The Third Count of the indictment was dismissed on motion of counsel for petitioner.

Petitioner was sentenced on July 26, 1974 to be confined to the New Jersey State Prison for a term of not less than one year and not more than one year and three months on each of the three counts of the indictment, each sentence to run concurrently.

On July 29, 1974, petitioner filed an appeal with the Superior Court of New Jersey, Appellate Division, whereby he sought *inter alia,* a reversal of the lower court conviction on the issue of the Sixth Amendment right to a speedy trial. The three judge panel of the Appellate Division unanimously reversed petitioner's conviction and directed the indictment to be dismissed. The Appellate Division opinion reads in part (See Appendix B, infra, pp. 24a to 25a):

> "The Supreme Court in *Barker* laid down a rule placing the primary burden on courts and prosecutors to assure that cases are promptly brought to trial. It prescribed, for consideration of such cases, 'a balancing test, in which the conduct of both the prosecution and the defendant are weighed.'
>
> . . .
>
> Applying the 'balancing test' in this case we find that the balance is weighted decisively against the State. The delay of nearly two years in the bringing of the indictment was, in the absence of an explanation, grossly inordinate. Defendant did not move for dismissal of the complaint, as he might have done under R. 3:25-3, but we recognize that as a practical matter defendant could hardly ask to be indicted. However, after the return upon him of this indictment, he promptly moved for its dismissal.
>
> The State, on the other hand, at no time offered any explanation or reason whatsoever for the delay and for its failure to move this case with anything approaching dispatch. The avoidance of such unexplained delay is the primary object of the constitutional guarantee. Although defendant has not demonstrated any specific prejudice to his defense,

Barker makes it clear that delay is inherently capable of leading to prejudice, both to defendant and society."

The State petitioned for certification to the Supreme Court of New Jersey and on June 26, 1975 said petition was granted. After briefs were filed and oral argument heard the Supreme Court of New Jersey in a 5-2 decision reversed the Appellate Division ruling and reinstated the trial court's judgment for conviction. See Appendix A, infra, p. 8a. The Court's majority opinion was based on the following (Appendix A, infra, pp. 6a to 7a):

> "Here defendant was not subjected to lengthy pretrial incarceration. He made no effort to assert his right to a speedy trial by moving to dismiss the pending complaint under R. 3:25-3. He claims no impairment of his ability to defend. Balancing these factors with the twenty-two (22) month delay and the State's failure to explain such delay we conclude that defendant was not denied his Sixth Amendment right to a speedy trial . . . However, our holding should not be understood to put a stamp of approval on the delay here involved. It should not have happened."

There were two (2) separate dissenting opinions in the New Jersey Supreme Court opinion. One dissent written by Justice Conford in part makes the following points (See Appendix A, infra, pp. 8a to 10a):

A. The balancing test in *Barker* led him to the same conclusion as the Appellate Division.

B. As a practical matter defendant could hardly be asked to be indicted. This is so despite R. 3:25-3.

C. Recognizes that, as in *Barker,* delay is inherently capable of leading to prejudice, both to defendant and society. Here, defendant necessarily suffered "anxiety, community hostility, and unsettlement of his affairs which every person under criminal charges is presumed to bear". Further, actual prejudice need not be proved to obtain relief.

D. That the dismissal of defendant's indictment is a "relatively small price to pay for alerting the prosecutorial machinery of the State to the social urgency of expeditious prosecutions of crime".

The second dissent was a lengthy opinion by Justice Pashman. In short, Justice Pashman made the following points in support of his position (See Appendix A, infra, pp. 10a to 19a):

A. The basis of the Appellate Division holding was sound and that he would affirm same.

B. The defendant does not carry the burden of seeking an indictment. Here, defendant asserted his constitutional right "soon after legal proceedings were instituted".

C. Recognized that there are certain inherent prejudices suffered by an accused which are the natural outgrowth of an arrest and, further, that defendant need not prove actual prejudice to sustain his contention. Justice Pashman then applied these general principles to the specific facts relating to defendant to show the apparent prejudice suffered by the defendant.

D. Expeditious prosecution of accuseds is the best means of vindicating the interest of society, and at the same time, protecting the legal rights of our citizens.

The appellant now seeks a review and reversal by the United States Supreme Court of the majority opinion of the New Jersey Supreme Court.

Reasons for Granting the Writ

The holding of the New Jersey Supreme Court in the matter *sub judice* is contrary to the holding in *Barker* v. *Wingo,* 407 U.S. 514, 33 L. Ed.2d 101 (1972) and other related cases dealing with the Sixth Amendment right to a speedy trial.

In *Barker* v. *Wingo, supra,* this Court held that the burden of bringing the accused to trial rests with the State. It is only when the delay is attributable to the accused that this burden may be overcome by the standard waiver rule. The demand-waiver rule was rejected.

Further, *Barker* established the four-prong test to be applied to speedy trial issues, to wit: (a) length of delay; (b) reason for the delay; (c) the accused's assertion of his right; (d) prejudice to the accused.

With regard to *length of delay* this Court determined in *Barker* that the circumstances of each individual case will be the determining factor. As a guideline this Court noted the following:

> "To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." (407 U.S. at p. 531).

With regard to *reason for delay* this Court in *Barker* stated that negligence or inadvertence on the part of the State would be a consideration in favor of the accused since the responsibility for bringing the accused to trial rests with the government.

The third factor enunciated by this Court in *Barker* was whether the accused requested a speedy trial. In rejecting the demand-waiver rule this Court held that the

accused did not have the duty to bring himself to trial. Moreover, there cannot be a presumption of a waiver of a fundamental constitutional right from mere inaction. To have a waiver there must be an "intentional relinquishment or abandonment" of a known right.

Finally, with regard to the question of *prejudice,* this Court held in *Barker* that an accused suffers inherent prejudices from the criminal charges even when he is not incarcerated.

In the concurring opinion of Justices White and Brennan in *Barker* the following was noted:

> "A defendant desiring a speedy trial, therefore, should have it within some reasonable time; and only special circumstances presenting a more pressing public need with respect to the case itself should suffice to justify delay." (407 U.S. at p. 537).

In *Moore* v. *Arizona,* 414 U.S. 25, 38 L. Ed.2d 183 (1973) this Court held that affirmative demonstration of prejudice by the accused was not required to establish the denial of his constitutional right to a speedy trial. In the opinion this Court reaffirmed the principle of inherent prejudices to an accused.

In *United States* v. *Marion,* 404 U.S. 307, 30 L. Ed.2d 468 (1971), this Court held *inter alia* that when an accused is arrested and held to answer criminal charges he becomes entitled to the protections of the Sixth Amendment right to a speedy trial.

In a most recent case of *Dillingham* v. *United States,* —— U.S. ——, 46 L. Ed.2d 205 (1975) this Court overturned a ruling of the Court of Appeals for the Fifth Circuit which had held that a twenty-two (22) month preindictment delay would not be considered for Sixth Amend-

ment speedy trial purposes unless the accused demonstrated actual prejudice. Hence, this Court reaffirmed its holding in *Marion* and *Barker.*

In *United States* v. *Hanna,* 347 F. Supp. 1010 (D. Del. 1972) the Court held that an eleven (11) month delay between arrest and indictment constituted a denial of the defendant's right to a speedy trial. The Court noted that the sole cause of delay was the government's failure to present its case to the grand jury, that the defendant did not engage in any dilatory tactics and that the government did not need that much time to prepare its case. Further, while the defendant failed to prove actual prejudice, the Court noted that *Barker* rejected the principle that mere inaction by an accused could constitute a waiver of the fundamental right to a speedy trial.

In *United States* v. *West,* 504 F.2d 253 (D.C. Cir. 1974) the Court held that a thirteen (13) month delay between arrest and trial for a non-violent offense requires a dismissal of the criminal charges when the legal issues and facts are not complex and when the acts of the accused have not caused the delay.

The petitioner herein asserts that the application of the law regarding rights to a speedy trial as set forth hereinabove establishes that his constitutional right has been abridged.

First, the time between petitioner's arrest and presentment of indictment to him was twenty-three (23) months. At the time of his arrest in February of 1972 the government required no additional evidence or time to establish a case against the petitioner. The charges involved herein were of an "ordinary" nature and the government could have made a presentment to the grand jury forthwith. Yet, the petitioner was not presented with the indictment until January, 1974.

Second, the government offered no valid execuse or reason for the delay. This fact is recognized and accepted by the majority opinion of the New Jersey Supreme Court (See Appendix A, infra, pp. 6a to 7a).

However, the New Jersey Supreme Court held that despite the above factors the petitioner, having failed to assert his rights pursuant to R. 3:25-3, and having failed to show actual prejudice, was not denied his right to a speedy trial (Appendix A, pp. 6a-7a).

By holding that petitioner failed to assert his rights under R. 3:25-3 and, thus, he waived his Sixth Amendment right to a speedy trial, the New Jersey Supreme Court has ruled contrary to principles set forth by this Court. First, this Court stated in *Barker* that mere inaction by an accused is insufficient to create a presumption of waiver of a fundamental constitutional right. Second R. 3:25-3, as applied by the New Jersey Supreme Court, has the effect of establishing a demand-waiver rule, such rule having been rejected by this Court in *Barker.* Third, as reflected in the opinion of the New Jersey Superior Court, Appellate Division, "as a practical matter defendant could hardly ask to be indicted" (Appendix B, p. 24a). (Also see Judge Conford's dissenting opinion in Appendix A, p. 9a). The situation of an accused in the pre-indictment stage vastly differs from the post-indictment stage, a fact not considered by the majority opinion of the New Jersey Supreme Court.

With regard to the question of prejudice the New Jersey Supreme Court's only statement was that "he (petitioner) claims no impairment of his ability to defend" (Appendix A, p. 6a). The Court completely failed to take into consideration the inherent prejudice an accused encounters. However, the dissenting opinions of Justice Conford (Appendix A, p. 9a) and Justice Pashman (Ap-

pendix A, pp. 13a-15a) clearly indicate a recognition and sensitivity to this inherent prejudice factor. As noted by Justice Pashman:

> "Here, defendant is an elderly individual with a large family which consists of his own children and the children of his sister whom he helped raise. At the time of his arrest, he had no prior record of criminal activity and was an exemplary citizen who was well respected in his community. He also was working steadily at two separate jobs. Under these circumstances his vulnerability to the prejudice mentioned above is apparent." (Appendix A, pp. 14a-15a).

In short, the balancing of factors required under *Barker* as applied to the circumstances in the matter *sub judice* clearly and unequivocally lead to the conclusion that the petitioner was denied his constitutional right to a speedy trial. Societal interest will best be served by reviewing and reversing the New Jersey Supreme Court ruling.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of New Jersey

(Filed—May 17, 1976)

SUPREME COURT OF NEW JERSEY

A-44 September Term 1975

STATE OF NEW JERSEY

Plaintiff-Appellant,

v.

JOSEPH G. SZIMA,

Defendant-Respondent.

Argued December 1, 1975—Decided May 17, 1976

On appeal from the Superior Court, Appellate Division, whose opinion is reported at 133 N. J. Super. 469.

Mr. Matthew P. Boylan, Director, Division of Criminal Justice, argued the cause for appellant (*Ms. Lois De Julio* and *Mr. Daniel Louis Grossman,* Deputy Attorneys General, of counsel and on the brief; *Mr. William F. Hyland,* Attorney General of New Jersey, attorney).

Appendix A

Mr. Harold Goldman argued the cause for respondent (*Messrs. Goldman, Carlet, Garrison & Bertoni,* attorneys).

The opinion of the Court was delivered by
SULLIVAN, J.

Defendant was convicted of bookmaking, working for a lottery and maintaining a gambling resort, violations of N.J.S.A. 2A:121-3, 3(a) and 3(c) respectively. The aggregate sentence imposed was not less than one year nor more than 15 months to be served in State Prison.

The Appellate Division, in an opinion reported at 133 N. J. Super. 469 (1975), reversed the judgment of conviction and ordered that the indictment be dismissed on the ground that defendant had been denied his right to a speedy trial guaranteed by the Sixth Amendment to the United States Constitution. This Court granted certification on the State's petition. 68 N. J. 170 (1975). Our conclusion is that defendant was not denied his constitutional right to a speedy trial. We therefore reverse the ruling of the Appellate Division and reinstate the judgment of conviction.

Defendant operated a bookmaking and numbers business out of his home in Garfield. The State Police, after obtaining court authorization, placed a tap on defendant's telephone and recorded on tape numerous instances of defendant's bookmaking and numbers activities extending over a period of some 13 days. Based on the foregoing, a warrant was obtained and a search of defendant's home was conducted by the State Police on February 4, 1972. Defendant, who was present in his home at the time, was arrested and charged with violations of the

Appendix A

gambling laws. He was arraigned in Municipal Court on February 11, 1972 and released on bail.

Some 22 months later (December 5, 1973) defendant was indicted by the State Grand Jury on the charges for which he was ultimately convicted.[1] In April 1974, defendant's motion to dismiss the indictment on the ground that he had been denied his Sixth Amendment right to a speedy trial was denied by the trial court. An application to the Appellate Division for leave to appeal this interlocutory ruling was denied on May 30, 1974.

When defendant was brought to trial in June 1974, defense counsel discussed with the trial judge the possibility of defendant's pleading guilty to the charges and at the same time preserving his right of appeal on the Sixth Amendment issue. The conclusion was that no such procedure was available.

Accordingly, defendant stood trial for the sole purpose of preserving his right to appeal the ruling on the Sixth Amendment issue. To that end defendant waived his right to a jury trial and stipulated to the admissibility of the State's wiretap evidence, that it was his voice recorded on the tape and that the State's witnesses were qualified experts in the fields of wiretaps, monitoring and gambling activites. The State on its part took the position that at sentencing defendant should be treated as if he had entered a guilty plea. As heretofore noted, defendant was found guilty.

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[1] Defendant was also indicted on a charge of possession of lottery paraphernalia, a violation of N.J.S.A. 2A:121-3(b). However, the trial court found that the State's proofs were insufficient to sustain this charge and dismissed it on defendant's motion.

Appendix A

The Appellate Division, in considering defendant's claim that he had been denied his Sixth Amendment right to a speedy trial, purported to apply the balancing test enunciated in *Barker* v. *Wingo,* 407 U. S. 514, 33 L. Ed. 2d 101 (1972). It found that the 22-month delay between the charge and indictment without any explanation or reason being offered for the delay was grossly inordinate and concluded that, under the *Barker* v. *Wingo* test, defendant had been denied his constitutional right to a speedy trial even though he had not demonstrated any specific prejudice to his defense. *State* v. *Szima,* 133 N. J. Super. 469, 473.

Preliminarily it should be noted that while most of the cases dealing with the right to a speedy trial are concerned with delay between indictment and trial, it is clear that the protection of the Sixth Amendment attaches upon arrest on a criminal charge and need not await indictment or information. *Dillingham* v. *United States,* —— U. S. ——, 46 L. Ed. 2d 205 (1975).

Prior to 1967 a defendant's right to a speedy trial in our State system was governed by Article I, paragraph 10 of the New Jersey Constitution. This provision was construed to be a right to move for such a trial. *State* v. *Masselli,* 43 N. J. 1 (1964); *State* v. *O'Leary,* 25 N. J. 104 (1957); *State* v. *Smith,* 10 N. J. 84 (1952). However, in 1967 the United States Supreme Court in *Klopfer* v. *North Carolina,* 386 U. S. 213, 18 L. Ed. 2d 1 (1967), held that the right to a speedy trial secured by the Sixth Amendment of the United States Constitution was "fundamental" and was imposed on the states by the Due Process Clause of the Fourteenth Amendment What was lacking, however, was any definitive pronouncement of the standards by which this right to a speedy trial was to be judged.

Appendix A

See concurring opinion of Brennan, J., in *Dickey* v. *Florida,* 398 U. S. 30, 26 L. Ed. 2d 26 (1970).

In 1972 the Supreme Court in *Barker* v. *Wingo, supra,* undertook to set out the dimensions of this right. First, rejecting the suggestion that a fixed time period be set, it held that the right to a speedy trial is relative and depends upon circumstances. The Court recognized that some legislatures had enacted laws and some courts had adopted rules of procedure fixing a specified time within which a defendant must be brought to trial, but it held that there was no constitutional basis for requiring that the speedy trial right be so quantified.

It also rejected the concept that the right to a speedy trial was waived if not demanded. However, it held that a defendant had some responsibility to assert a speedy trial claim and emphasized that failure to assert the right would make it difficult for a defendant to prove that he was denied a speedy trial. The proper approach suggested by the Supreme Court was an *ad hoc* balancing test in which the conduct of both the prosecution and the defendant are weighed.

Four factors which courts should assess in determining whether a particular defendant has been deprived of the right to a speedy trial were identified. They are length of delay, the reason for the delay, the defendant's assertion of the right and prejudice to the defendant. The factor of prejudice was said to include oppressive pretrial incarceration, anxiety and concern of the accused and impairment of the defense. Of these, impairment of the defense was considered the most serious since it went to the question of fundamental fairness.

The Court regarded none of the four factors as either a necessary or sufficient condition to the finding of a deprivation of the right to a speedy trial. Rather, they were to be treated as related factors to be considered with such other circumstances as may be relevant.

The Appellate Division recognized the *Barker* test as controlling but, in applying it, rested its determination on the length of the delay and the absence of any explanation for such delay. The Appellate Division noted that defendant could have moved to dismiss the complaint under R. 3:25-3 for unnecessary delay in presenting the charge to the grand jury but held that "such failure" did not constitute a waiver of defendant's Sixth Amendment right to a speedy trial.

An additional factor which the Appellate Division indicated was relevant was the societal interest in bringing swift prosecution and the obligations of the State to protect that interest.

We recognize that application of a balancing of interests test must be on an *ad hoc* basis and necessarily involves subjective reaction to the balancing of circumstances. Our difficulty with the Appellate Division ruling is that it viewed primarily the conduct of the prosecution, and failed to weigh in the balance, as *Barker* requires, defendant's conduct also, and the impact of the delay on him.

Here defendant was not subjected to lengthy pretrial incarceration. He made no effort to assert his right to a speedy trial by moving to dismiss the pending complaint under R. 3:25-3. He claims no impairment of his ability to defend. Balancing these factors with the 22-month delay and the State's failure to explain such delay we

conclude that defendant was not denied his Sixth Amendment right to a speedy trial. See *People* v. *Taranovich,* 37 N. Y. 2d 442 (1975) (one year interval between arraignment and indictment). However, our holding should not be understood to put a stamp of approval on the delay here involved. It should not have happened.

It may well be that as a matter of policy the State should ordinarily be required to bring an accused to trial within a specified period of time. See Rule 722, *Uniform Rules of Criminal Procedure of the National Conference of Commissioners on Uniform State Laws* (App. Draft 1974); *National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts,* Section 4.1 (1973); *American Bar Association, Standards Relating to Speedy Trial,* Section 2.1 (App. Draft 1968). This would not only protect the public interest in speedy justice, but also assure an accused a speedy trial. We are presently considering the adoption of an appropriate court rule.

Defendant also argues that the sentence imposed on him was manifestly excessive under the circumstances. He had no prior criminal record of any kind and enjoyed a stable home environment and good standing in his community. Based on the foregoing it is contended that the sentence imposed should have been noncustodial.

The sentencing judge took these factors into consideration. However, the record indicated that defendant was a "sitter" in a significant gambling operation and there were "higher ups" involved. Although defendant, for all practical purposes, admitted his guilt, he refused to cooperate with the State. See *State* v. *Ivan,* 33 N. J. 197 (1960); *State* v. *De Stasio,* 49 N. J. 247 (1967). A sentencing

judge is given broad discretion in fixing the quantum of sentence, so long as it is within statutory bounds. Before a reviewing court may revise a sentence there must be a clear showing of abuse of discretion. *State* v. *Tyson,* 43 N. J. 411, 417 (1964), *cert.* denied 380 U. S. 987 (1965). We are not persuaded that the sentence imposed on defendant was manifestly excessive.

The judgment of the Appellate Division is reversed and the judgment of conviction is hereby reinstated.

CONFORD, P.J.A.D., temporarily assigned, dissenting.

I agree with the majority that *Barker* calls for "application of a balancing of interests test • • • on an *ad hoc* basis and necessarily involves subjective reaction" to the balanced consideration of the four pertinent factors—length of time, excuse for delay, demand by defendant and prejudice. (Slip opinion, pp. 7-8). However my own balancing of the stated factors as applied to the instant circumstances leads to concurrence with the Appellate Division conclusion for dismissal of the indictment on speedy trial grounds, and for essentially the same reasons as set forth in its *per curiam* opinion. 133 N. J. Super. 469 (App. Div. 1975).

I cannot agree with the majority's assessment of the Appellate Division opinion as failing "to weigh in the balance • • • defendant's conduct also, and the impact of the delay on him." (Slip opinion, p. 7). The court adverted to the fact that defendant did move to dismiss the indictment on speedy trial grounds and that, as to the

situation prior to indictment, "as a practical matter defendant could hardly ask to be indicted." 133 N. J. Super. at 473. I agree with that observation. Moreover, at what time period or periods prior to indictment could defendant reasonably be required to have made motions to dismiss the charge under R. 3:25-3? Every three months; six months, etc? See *Barker* v. *Wingo, supra,* 407 U. S. at 527-528. I believe it should be assumed that a charged but unindicted defendant wants the charge disposed of, one way or the other, with reasonable dispatch, without being required to prove that desire by periodic motions to dismiss at peril of loss of his constitutional right to an expeditious prosecution.

As to prejudice, as the Appellate Division observed, "*Barker* makes it clear that delay is inherently capable of leading to prejudice, both to defendant and society." 133 N. J. Super. at 473. That is a correct reading of *Barker.* While defendant was not prejudiced in the actual defense against the charge (as he conceded guilt) he did sustain the anxiety, community hostility, and unsettlement of his affairs which every person under criminal charges is presumed to bear, see *Barker* v. *Wingo,* 407 U. S. at 532, 533, 534. Moreover, it is now clear that "actual prejudice" is not necessarily a prerequisite to relief on "speedy trial" grounds. *Dillingham* v. *United States,* —— U. S. ——, 46 L. Ed. 2d 205, 207 (1975).

Finally, I do not believe the majority sufficiently weighs the community interest in discouraging the kind of totally unjustified delay for which the State was here responsible over a period of 28 months between arraignment and trial. Dismissal of this gambling prosecution on speedy trial grounds would, I think, be a relatively small price to pay

for altering the prosecutorial machinery of the State to the social urgency of expeditious prosecution of crime. See majority slip opinion, p. 8; *Barker* v. *Wingo, supra,* 407 U. S. at 519-520.

I would affirm the judgment of the Appellate Division.

PASHMAN, J., dissenting

This case considers whether an unexplained lapse of 22 months between the time of arrest and a subsequent indictment constitutes a denial of the fundamental right to a speedy trial. All parties agree that disposition of the matter depends on the proper application of the balancing test established by the Unied States Supreme Court in *Barker* v. *Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972).[1] This test assesses the conduct of both the

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[1] While there was once authority for the proposition that pre-indictment delays do not implicate a defendant's right to a speedy trial as do delays in bringing a case to trial after indictment, *see e.g., United States* v. *Palmer,* 502 F.2d 1233 (5 Cir. 1974), rev'd *sub nom Dillingham* v. *United States,* —— U.S. ——, 96 S.Ct. - —, 46 L.Ed. 2d 205, 207 (1975); *United States* v. *Zane,* 489 F.2d 269, 270 (5 Cir. 1973), *cert.* den. 416 U.S. 959, 94 S.Ct. 1975, 40 L.Ed. 2d 310 (1974); *United States* v. *Smith,* 487 F.2d 175, 177 (5 Cir. 1973), *cert.* den. 419 U.S. 846, 95 S.Ct. 82, 42 L.Ed. 2d 75 (1974), it is now well settled that the right to a speedy trial attaches upon arrest and "need not await indictment, information or other formal charge." *Dillingham* v. *United States, supra,* —— U.S. at ——, 96 S.Ct. at ——, 46 L.Ed. 2d at 207; *United States* v. *Marion,* 404 U.S. 307, 321, 92 S.Ct. 455, 30 L.Ed. 2d 468, 479 (1971); *cf. Barker* v. *Wingo, supra,* 407 U.S. at 519-20, 92 S.Ct. at ——, 33 L.Ed. 2d at 110-111, Note, "The Right to a Speedy Trial," 20 *Stan.L.Rev.* 476 (1968).

prosecution and the defendant, and specifically considers factors such as the length of delay, the reason for the delay, the defendant's assertion of his right and the prejudice suffered by the defendant. *Barker* v. *Wingo, supra,* 407 U.S. at 530, 92 S.Ct. at ——, 33 L.Ed. 2d at 116-117. In applying the test to this case, the Appellate Division held that defendant was denied his right to a speedy trial and was therefore entitled to dismissal of his indictment for bookmaking, working a lottery and maintaining a gambling resort. *State* v. *Szima,* 133 N.J. Super. 469 (App. Div. 1975). The majority today admits that the Appellate Division utilized the correct test, but reverses on that court's improper application of the test. I find the majority's criticism of the Appellate Division to be wholly unfounded and, accordingly, I dissent and would affirm.

First, the majority differentiates its position from that of the Appellate Division on the basis of factors which should have, but supposedly did not, enter the weighing process in which the Appellate Division engaged in its application of the *Barker* test:

> We recognize that application of a balancing of interests test must be on an *ad hoc* basis and necessarily involves subjective reaction to the balancing of circumstances. Our difficulty with the Appellate Division ruling is that it viewed primarily the conduct of the prosecution and failed to weigh in the balance, as *Barker* requires, defendant's conduct also, and the impact of the delay on him. [Slip opinion at 7]

This objection, however, misinterprets the decision of the Appellate Division. Contrary to what the majority contends, that court not only reviewed defendant's conduct, but confronted this task in a very direct fashion.

> Defendant did not move for dismissal of the complaint, as he might have done under R. 3:25-3, but we recognize that as a practical matter defendant could hardly ask to be indicted. However, after the return and service upon him of this indictment, he promptly moved for its dismissal. [133 N.J. Super. at 473]

This factor was weighed against other pertinent considerations after which the court concluded that "the balance is weighted decisively against the State." 133 N.J. Super. at 472. I agree.

Support for this conclusion may be found in comparisons between the instant case and *Barker* v. *Wingo*. There, the United States Supreme Court rejected defendant's claim that his sixth amendment rights had been denied, but recognized that a "close" case was presented. *Id.* 407 U.S. at 533, 92 S.Ct. at ——, 33 L.Ed.2d at 119. The Court, while conceding that the length of delay (5 years) was both extraordinary and to some degree unjustified, identified as the "most important" countervailing factor, "the fact that Barker did not want a speedy trial." This conclusion was based on evidence that Barker had not objected to the prosecution's numerous motions for adjournment. *Id.* 407 U.S. at 534-535, 92 S.Ct. at ——, 33 L.Ed.2d at 119. By contrast, in the instant case, defendant asserted his rights soon after the legal proceedings were initiated. Though defendant did not object to the delay which preceded his indictment, this situation is clearly distinguishable from a failure to object to prosecutorial requests for a continuance after an indictment has been returned and a trial has been scheduled (as in *Barker* v. *Wingo*). *Compare,* 407 U.S. at 536, 92 S.Ct.

at ——, 33 L.Ed.2d at 120. The burden of seeking an indictment has never been and should never be placed on defendant. *Id.* 407 U.S. at 529, 92 S.Ct. at ——, 33 L.Ed.2d at 116.

Second, after criticizing the Appellate Division for striking an improper balance of the pertinent speedy trial factors, my Brethren place undue weight on the alleged absence of specific prejudice to the defendant. In particular, they note that Szima was not subjected to the inconveniences which are usually associated with delayed trials such as lengthy pretrial proceedings and pretrial incarceration. Similarly, they note that the defendant did not suffer any substantial impairment of his defense. Nevertheless, as enunciated by the Supreme Court in *Barker* v. *Wingo, supra,* 407 U.S. at 533, 92 S.Ct. at ——, 33 L.Ed. 2d at 118, and as restated by the majority here (slip opinion at 6-7), none of the four factors which were specifically identified is indispensable to finding a denial of the right to a speedy trial. Furthermore, failure to establish actual prejudice does not preclude vindication of this constitutional right. *Moore* v. *Arizona,* 414 U.S. 25, 26, 922 S.Ct. 188, 38 L.Ed.2d 183, 185 (1973); *Dillingham* v. *United States, supra,* —— U.S. at ——, 96 S.Ct. at ——, 46 L.Ed.2d at 207; *see Note, supra,* 20 Stan. L. Rev. at 497-501. In any event, I find that defendant did incur prejudice in the instant case.

It is well settled that even where a defendant is not subjected to lengthy pretrial incarceration, he may nonetheless be severely prejudiced by an unreasonable delay in his prosecution. For example, prejudice may be manifested in terms of faded memories, lost evidence, or increased anxiety which the criminal defendant experiences as he awaits disposition of his case. *United States* v.

Mann, 291 F.Supp. 268, 271 (S.D.N.Y. 1968); *cf. Smith* v. *Hooey,* 393 U.S. 374, 380, 89 S.Ct. 575, 21 L.Ed. 2d 607, 612 (1969); *Petition of Provoo,* 17 F.R.D. 183, 203 (D. Md. 1955), aff'd *per curiam,* 350 U.S. 857, 76 S.Ct. 101, 100 L.Ed. 761 (1955). *Frankel* v. *Woodrough,* 7 F.2d 796, 798-99 (8 Cir. 1925); *Hanrahan* v. *United States,* 121 U.S. App.D.C. 134, 348 F. 2d 363, 367 (D.C. Cir. 1965). In addition, the defendant automatically endures "restraints on his liberty" and lives "under a cloud of anxiety, suspicion, and often hostility." *Barker* v. *Wingo, supra,* 407 U.S. at 533, 92 S.Ct. at ——, 33 L.Ed. 2d at 118. *See also United States* v. *Ewell,* 383 U.S. 116, 120, 86 S.Ct. at 773, 15 L.Ed. 2d at 627, 630 (1966); *Smith* v. *Hooey, supra,* 393 U.S. at 377-380, 89 S.Ct. at ——, 21 L.Ed. 2d at 611-612; *Klopfer* v. *North Carolina,* 386 U.S. 213, 221-22, 87 S.Ct. 988, 18 L.Ed. 2d 1, 6-7 (1967); *Hanrahan* v. *United States, supra,* 348 F.2d at 366-367. Finally, as the Supreme Court most recently explained in *Dillingham* v. *United States, supra*:

> Arrest is a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends. [—— U.S. at ——, 96 S.Ct. at ——, 46 L.Ed. at 207]

While this form of prejudice may be *de minimis* in some cases, clearly in this case such prejudice is quite significant. Here, the defendant is an elderly individual with a large family which consists of his own children and the children of his sister whom he helped raise. At the time of his arrest, he had no prior record of criminal activity

and was an exemplary citizen who was well respected in his community. He also was working steadily at two separate jobs. Under these circumstances, his vulnerability to the prejudice mentioned above is apparent.

Finally, as the Supreme Court recognized in *Barker* v. *Wingo, supra,* 407 U.S. at 519, 92 S.Ct. at ——, 33 L.Ed. 2d at 110-111, "There is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused." In reaching its decision, the majority today overlooks this important societal interest.

The right to a speedy trial, which finds its origins in the Magna Carta, has been transposed to the United States Constitution by means of the sixth amendment.[2] This right has been clearly recognized as "fundamental" and hence applicable to the states through the Due Process Clause of the fourteenth amendment.[3] *Klopfer* v.

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[2] The sixth amendment in relevant part provides:

> In all criminal prosecutions, the accused shall enjoy the right to a *speedy and public trial,* by an impartial jury of the State and district wherein the crime shall have been committed, . . . [*U.S. Const.,* Amend. VI; emphasis supplied]

[3] The United States Supreme Court, in *Klopfer* v. *North Carolina, supra,* discussed the historical background of this right:

> We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment. That right has its roots at the very foundation of our English law heritage. Its first articulation in modern jurisprudence appears to have been made in Magna Carta (1215), wherein it was written, "We will sell to no man, we will not

(Footnote continued on following page)

North Carolina, supra, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed. 2d 1; *see also Dickey* v. *Florida,* 398 U.S. 30, 37-38, 90 S.Ct. 1564, 26 L.Ed. 2d 26, 31-32 (1970); *Smith* v. *Hooey, supra,* 393 U.S. at 375, 383, 89 S.Ct. at ——, 21 L.Ed. 2d at 609, 614. With respect to the public interest in this guarantee, the Supreme Court in *Barker* v. *Wingo, supra,* 407 U.S. at 519-21, 92 S.Ct. at ——, 33 L.Ed. 2d at 111 stated:

(Footnote continued from preceding page)

deny or defer to any man either justice or right"; but evidence of recognition of the right to speedy justice in even earlier times is found in the Assize of Clarendon (1166). By the late thirteenth century, justices, armed with commissions of gaol delivery and/or oyer and terminer were visiting the countryside three times a year. These justices, Sir Edward Coke wrote in Part II of his Institutes, "have not suffered the prisoner to be long detained, but at their next coming have given the prisoner full and speedy justice, . . . without detaining him long in prison." To Coke, prolonged detention without trial would have been contrary to the law and custom of England; but he also believed that the delay in trial, by itself, would be an improper denial of justice. In his explication of Chapter 29 of the Magna Carta, he wrote that the words "We will sell to no man, we will not deny or defer to any man either justice or right" had the following effect:

"And therefore, every subject of this realme, for injury done to him in bonis, terris, vel persona, by any other subject, be he ecclesiasticall, or temporall free, or bond, man, or woman, old, or young, or be he outlawed, excommunicated, or any other without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any denial and speedily without delay." [386 U.S. at 223-24; 87 S.Ct. at ——, 18 L.Ed. 2d at 8-9; footnotes omitted]

> The inability of courts to provide a prompt trial has contributed to a large backlog of cases in urban courts which, among other things, enables defendants to negotiate more effectively for pleas of guilty to lesser offenses and otherwise manipulate the system. In addition, persons released on bond for lengthy periods awaiting trial have an opportunity to commit other crimes. It must be of little comfort to the residents of Christian County, Kentucky, to know that Barker was at large on bail for over four years while accused of a vicious and brutal murder of which he was ultimately convicted. Moreover, the longer an accused is free awaiting trial, the more tempting becomes his opportunity to jump bail and escape. Finally, delay between arrest and punishment may have a detrimental effect on rehabilitation. [Footnotes omitted]

To this one might add that it is the correlation between the speed and certainty of punishment, rather than its degree or harshness, that provides the most effective deterrent to crime. *Nat'l Advisory Comm. on Criminal Justice Sandards and Goals, A National Strategy to Reduce Crime,* 94 (1973); *President's Comm'n on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society,* 154-56 (1967); *Nat'l Comm'n on the Causes and Prevention of Violence, Task Force on Law and Law Enforcement, Law and Disorder Reconsidered,* 509-524 (1968).

The paramount importance of effectuating the right to a speedy trial received recent and explicit statutory recognition by the passage of the federal "Speedy Trial Act of 1974," 18 U.S.C.A. § 3161 *et seq.* This legislation re-

quires that "any information or indictment charging an individual with the commission of an offense shall be filed within *thirty days* from the date on which such individual was arrested." 18 U.S.C.A. 3161(b) [emphasis supplied].[4] Compare this requirement with the 22-month period in the instant case. The importance of bringing defendants to trial expeditiously was also recognized in the Governor's most recent "State of the State" address, where he proposed that all defendants indicted for violent crimes be brought to trial within 90 days. *Annual Message of Governor Brendan Byrne,* 17 (Jan. 13, 1976).

Certainly, where good reasons exist for a delay, courts may be justified in finding no denial of the right to a speedy trial. However, the instant case presents an exemplary situation for affirmative enforcement of the aforementioned societal interests. See *Barker* v. *Wingo, supra,* 407 U. S. at 531, 92 S. Ct. at ——, 33 L. Ed. 2d at 117. This case involved an uncomplicated "street crime" which presumably could have been prosecuted without much difficulty. The State's case relied almost exclusively on defendant's telephone conversations which were recorded during a 13-day period. There was no indication that any additional investigation was either undertaken or required for presentation of the prosecution's case. Since these

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[4] The Speedy Trial Act of 1974 includes gradual implementation of this requirement, providing that indictments shall be returned within 60 days in the first 12-calendar-month period after the effective date of the Act, within 45 days in the second 12-calendar-month period and within 35 days in the third 12-calendar-month period. 18 U.S.C.A. § 3161(f). The Act also establishes time limits for other aspects of the criminal process and imposes sanctions—such as dismissal of the indictment—for failure to comply with these limitations. 18 U.S.C.A. § 3161 *et seq.*

tape recordings were in the possession of the prosecution at the time of defendant's arrest, there is no discernible reason why the prosecution failed to proceed expeditiously.[5] As the Supreme Court observed in *Barker* v. *Wingo, supra,* "the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." 407 U. S. at 531, 93 S. Ct. at ——, 33 L. Ed. 2d at 117.

Expeditious prosecution should be encouraged to vindicate society's interests and to protect the rights of the individual defendant. This is an appropriate case for advancing this dual purpose of the sixth amendment.

I would affirm the Appellate Division, vacate the conviction and dismiss the indictment.

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[5] It is in this respect that the instant case is distinguishable from *People* v. *Taranovich,* 37 N.Y.2d 442, 373 N.Y.S.2d 79, —— N.E. 2d —— (Ct.App. 1975), cited by the majority. In that case, finding that a speedy trial had not been denied, the court wrote:

> The third factor, the nature of the underlying charge, would appear to be in the People's favor. Appellant was arrested for attempted murder, a class B felony, and indicted for assault in the first degree, a class C felony. Upon such a serious charge, the District Attorney may be expected to proceed with far more caution and deliberation than he would expend on a relatively minor offense. [373 N.Y.S. 2d at 82]

The case is also distinguishable on the grounds that the delay (a one-year lapse between arraignment and indictment was not as lengthy as in the instant case and the existence of prejudice was not as apparent.

APPENDIX B

Opinion of the New Jersey Superior Court, Appellate Division

(Filed-April 22, 1975)

SUPFRIOR COURT OF NEW JERSEY, APPELLATE DIVISION

State of New Jersey, Plaintiff-Respondent v. Joseph G. Szima, Defendant-Appellant.

Argued April 8, 1975—Decided April 22. 1975.

SYNOPSIS

Defendant was convicted in the Superior Court, Law Division, of violating statutory prohibitions against gambling and related activities, and he appealed. The Superior Court, Appellate Division, held that delay of nearly two years in bringing indictment against defendant was, in absence of an explanation, grossly inordinate and was such as to constitute a violation of defendant's right to a speedy trial, even though defendant did not move for dismissal of initial complaint, where defendant, who could hardly be expected to request indictment, promptly moved for dismissal upon service of indictment; and though defendant did not demonstrate any specific prejudice to his defense, delay was inherently capable of leading to prejudice, both to defendant and to society.

Reversed and remanded with direction.

1. Criminal law

Question whether right of accused to a speedy trial has been denied focuses upon delay between indictment and

Appendix B

trial and delay between initial complaint and return of indictment by grand jury. R. 3:25-2; R. 3:25-3; U.S.C.A. Const. Amend. 6.

2. Criminal law

Though complaint filed prior to return of indictment by grand jury was not dismissed either upon defendant's motion or upon motion of assignment judge, such failure did not constitute a waiver of defendant's right to a speedy trial. R. 3:25-2; R. 3:25-3; U.S.C.A. Const. Amend. 6.

3. Criminal law

Factors to be considered in determining whether defendant has been denied his right to a speedy trial are length of delay, reason for delay, defendant's assertion of his right, and prejudice to defendant. R. 3:25-2; R. 3:25-3; *U. S. C. A. Const. Amend.* 6.

4. Criminal law

Delay of nearly two years in bringing indictment against defendant was, in absence of an explanation, grossly inordinate and was such as to constitute a violation of defendant's right to a speedy trial, even though defendant did not move for dismissal of initial complaint, where defendant, who could hardly be expected to request indictment, promptly moved for dismissal upon service of indictment; and though defendant did not demonstrate any specific prejudice to his defense, delay was inherently capable of leading to prejudice, both to defendant and to society. R. 3:25-2; R. 3:25-3; *U. S. C. A. Const. Amend.* 6.

Appendix B

Before Judges HALPERN, CRAHAY and WOOD.

Mr. Harold Goldman argued the cause for appellant (*Messrs. Goldman, Carlet, Garrison & Bertoni,* attorneys; *Mr. Goldman* of counsel and on the brief).

Mr. Richard J. Engelhardt, Deputy Attorney General, argued the cause for respondent (*Mr. William F. Hyland,* Attorney General of New Jersey, attorney; *Mr. Richard J. Engelhardt* of counsel and on the brief).

PER CURIAM. Defendant was arrested on February 4, 1972 and charged with various gambling and related activities in violation of N.J.S.A. 2A:112-3 and N.J.S.A. 2A:121-3. He was arraigned on said charges in the Municipal Court of the City of Garfield on February 11, 1972.

In January 1974, about 23 months after his arrest, he was served with a state grand jury indictment charging him with bookmaking (N.J.S.A. 2A:112-3), working for a lottery (N.J.S.A. 2A:121-3(a)), maintaining a gambling resort (N.J.S.A. 2A:121-3(c)), and possession of lottery slips (N.J.S.A. 2A::121-3(b)).

In April 1974 he moved to dismiss the indictment on the ground that he was denied a speedy trial as guaranteed by the Sixth Amendment to the Constitution of the United States.[1] The motion was denied, as was motion for leave to take an interlocutory appeal to this court.

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[1] The Sixth Amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

Appendix B

Defendant then went to trial, waiving trial by jury and reserving his constitutional claims. He was convicted on three counts of the indictment and sentenced to concurrent State Prison terms of not less than one year nor more than 15 months. His principal ground of appeal is the asserted violation of his constitutional right to speedy trial.

Surprisingly, although the right to speedy trial is of equal stature with other rights guaranteed by the Constitution, it was only occasionally and sporadically dealt with by the Supreme Court of the United States prior to its decision in *Barker* v. *Wingo,* 407 U. S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d at 101 (1972). Prior to that decision it was the rule in most jurisdictions that a defendant must make a demand for speedy trial as a prerequisite to a motion to dismiss for failure to accord him that right.

[1] Our court rules provide for the implementation of that right in two situations: delay between indictment and trial, R. 3:25-2, and (that which obtains here) delay between the initial complaint and the return of an indictment by the grand jury. As to the latter, R. 3:25-3 provides:

> If there is unnecessary delay in presenting the charge to a grand jury or in filing an accusation against a defendant who has been held to answer upon a complaint, the Assignment Judge may dismiss the complaint on his or the defendant's motion.

[2] Here the complaint was not dismissed either upon defendant's motion or upon that of the assignment judge. Nevertheless, such failure did not constitute a waiver of the protection of the Sixth Amendment. In *Barker* v. *Wingo, supra,* the court said:

Appendix B

> The nature of the speedy trial right does not make it impossible to pinpoint a precise time in the process when the right must be asserted or waived, but that fact does not argue for placing the burden of protecting that right solely on defendants. A defendant had no duty to bring himself to trial; the State has that duty as well as the duty of insuring that the trial is consistent with due process. Moreover * * * society has a particular interest in bringing swift prosecutions, and society's representatives are the ones who should protect that interest. [407 U. S. at 527, 92 S. Ct. at 2190]

[3] The Supreme Court in *Barker* laid down a rule placing the primary burden on courts and prosecutors to assure that cases are promptly brought to trial. It prescribed, for consideration of such cases, "a balancing test, in which the conduct of both the prosecution and the defendant are weighed." Four such factors are identified: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." 407 U. S. at 530, 92 S. Ct. at 2192.

[4] Applying the "balancing test" in this case we find that the balance is weighted decisively against the State. The delay of nearly two years in the bringing of the indictment was, in the absence of an explanation, grossly inordinate. Defendant did not move for dismissal of the complaint, as he might have done under R. 3:25-3, but we recognize that as a practical matter defendant could hardly ask to be indicted. However, after the return and service upon him of this indictment, he promptly moved for its dismissal.

Appendix B

The State, on the other hand, at no time offered any explanation or reason whatever for the delay and for its failure to move this case with anything approaching reasonable dispatch. The avoidance of such unexplained delay is the primary object of the constitutional guarantee. Although defendant has not demonstrated any specific prejudice to his defense, *Barker* makes it clear that delay is inherently capable of leading to prejudice, both to defendant and to society.

The State's failure in this case leaves us no choice but to conclude that, under the *Barker* v. *Wingo* tests, there has been an unconstitutional denial to the defendant of his right to speedy trial. The only remedy for that deprivation is dismissal of the indictment. A reduction in sentence will not suffice. *Strunk* v. *United States,* 412 U. S. 434, 93 S. Ct. 2260, 37 L. Ed. 2d 56 (1973). Thus we find it unncessary to consider defendant's contention that the sentence was excessive.

The judgment is reversed and the case remanded with direction that the indictment be dismissed.

APPENDIX C

Opinion of the New Jersey Superior Court, Law Division (April 19, 1974)

SUPERIOR COURT OF NEW JERSEY, LAW DIVISION—
BERGEN COUNTY

SGJ 16-13-1

Indictment No. S1705-03

Criminal Action

STATE OF NEW JERSEY,

Plaintiff,

-v-

JOSEPH G. SZIMA,

Defendant.

Courthouse
Hackensack, New Jersey

April 19, 1974

Before:

The Honorable Fred C. Galda, J.S.C.

Appearances:

For the State: Charles Buckley, Esq.
Assistant Prosecutor

For the Defendant: Harold Goldman, Esq.

Appendix C

Mr. Goldman: My name is Harold Goldman. I represent the defendant, Joseph Szima.

This is a motion to quash the indictment for the violation of the defendant's constitutional right to a speedy trial.

I would like to review the entire background of this matter.

Apparently, a reliable informant approached the State authorities and gave them information relating to illegal gambling, an illegal gambling operation at a certain location and over a certain telephone.

As a result of this information, the police took certain steps and following those steps, an application was submitted for a wire tap and the application was granted.

As a result of the information received from the wire tap and the information provided by the informant and the independent information apparently obtained by the police authorities, a warrant was issued to search the defendant's home.

Now this warrant was executed in February of 1972 and as a result of the execution of the warrant, the defendant was arrested and arraigned on a complaint in February of 1972.

From that period to January of 1974, a period of twenty-three months, the defendant—well, strike that. The defendant was then noticed in January, 1974, twenty-three months after his initial arraignment on the complaint, that an indictment was returned against him, and it is our contention that this twenty-three-month delay violated the defendant's constitutional rights to a speedy trial.

Appendix C

The cases as I cited in the brief and submitted to the Court, I think clearly indicate that unless the State can show valid reason for the delay that the rights of the defendant were violated.

I refer specifically to *United States* v. *Hanna,* a Delaware District Court of the United States where the Court specifically stated that where the delay is the result of the government's failure to return an indictment, and in this case it was eleven months, and the delay is wholly unrelated to present the defendant's case to a Grand Jury, that the defendant's rights, the defendant's constitutional rights, are violated.

In this particular case, your Honor, at the time, in February of 1972, at the time of the defendant's arraignment on the complaint, the State had all the information it needed to present its case to a Grand Jury, and by failing to do it, by failing to make that presentation within a reasonable time, the defendant has, as I stated earlier, a violation, and it is a violation of the constitutional rights of the defendant and as a result, we contend that the indictment should be quashed.

There is another case which I refer to in my brief, *United States* v. *Butler,* which is a 1970 Federal Court opinion which I also think supports our contention. In that case I believe it was a bank robbery that was involved. There were six eyewitnesses and the same situation existed. The State had those eyewitnesses right there and they were able to within a reasonable time make a presentation to the Grand Jury. They failed to do so. I believe there it was a nine-month delay, and while the Court held that it was without justifiable cause on the part of the State for the delay and the indictment had to be quashed.

Appendix C

Everything else is set forth in my brief.

The Court: Mr. Buckley.

Mr. Buckley: Thank you, Judge.

I think the cases cited by counsel are readily distinguishable.

The last case cited, *United States* v. *Butler,* deals with the delay between the indictment and the arraignment, nine months between the indictment where the circumstances were different.

If you read what the Court is talking about, the circumstances there are entirely different than we have here.

I would like to refer the Court to the case of *United States* v. *Hanna.*

The *Hanna Case* deals with a situation where the government, for its own purposes and for reasons best known to it, and in an attempt to further its interests in another case, obviously and deliberately refused to present the matter to the Grand Jury in order to determine whether or not there could be an indictment in the case against Mr. Daniel Gregory.

I will read from Page 1014, 347 Federal Supplement.

> "Taking the approach as a guide the Court finds that the delay of 11 months is not of such length as to give rise to a probability of substantial prejudice. That being so, the burden remains on the defendant to show prejudice, and none having been shown, the Court concludes that no real prejudice has resulted from the delay."

"Because of the 11 month delay in returning the indictment was at the instigation of the government to serve as an incentive for the defendant to testify in the trial of another, a reason unconnected with, and unnecessary to the preparation of the government's case against the defendant and because he cannot be held under the circumstances to have acquiesced in the unnecessary delay, the Court concludes that the defendant's Sixth Amendment right to a speedy trial was violated and Count One of the indictment should be dismissed."

I think we should look to the case of *Barker* v. *Wingo,* 407 U. S. 514, where it is cited in the movant's brief, and I am quoting from the 92 Supreme Court Reporter, Page 2182, and I am quoting from Page 2192.

"A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis."

The Court sets forth the four standards with respect to the Courts such as: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant."

In this case, incidentally, I think there was a five-year delay between the arrest and the indictment. Or it might be five years between the indictment and the trial. I don't recall. But there was an abnormally long delay.

The Court says, with respect to those four standards which the Court sets forth, and I am quoting at 2192:

"We have already discussed the third factor, the defendant's responsibility to assert his right. Whether and how a defendant asserts his right is closely

related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprevation, the more likely a defendant is to complain. The defendant's assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial."

It was represented that there was a claim earlier on February 18, 1972, when the matter was listed for trial before Judge Boyle in Garfield. So he knew that there was an appearance.

The Court: I was trying to clarify something in my mind. You say in your brief that they had an arraignment on February 11, 1972. I gather from what Mr. Buckley says that there was a preliminary hearing February 18th, when you talk about the arraignment in the Municipal Court complaint. You're talking about on the indictment?

Mr. Goldman: Yes.

The Court: Look at the first page. You said there was an arraignment on February 11, 1972.

Mr. Goldman: I tried to stress that in my presentation.

The Court: That clarifies that. That was the only question I raise. Why do you say the arraignment when the indictment only came down in 1974?

Mr. Buckley: There was an arraignment scheduled. The preliminary hearing was scheduled for the 18th. It was adjourned by Mr. Goldman who advised Judge Boyle that notwithstanding any preliminary hearing they would waive their right to a preliminary hearing. I think that shows the true picture in this case. Mr. Goldman and Mr. Szima don't say that they want the indictment returned forthwith. They don't say: Mr. Attorney General, get this case to the Grand Jury because you are prejudicing my rights. They were just happy to let everything slide. Now for the first time they assert their rights to a speedy trial.

I suggest that in *Barker* v. *Wingo* where they ask for a dismissal of the indictment because of a lack of a speedy trial, there that point is brought out very clearly and emphatically regarding a defendant's rights where he alleges that he had been prejudiced.

I am with the State government in the criminal investigation section and in the two years that I have been there, I have never heard from Mr. Goldman as to the pendency of this matter being brought before a Grand Jury or his mentioning anything about a speedy trial.

I think the motion should be denied on the basis of *Barker* v. *Wingo.*

The Court: Anything further?

Mr. Goldman: Just in response to Mr. Buckley's comments.

In *Barker* v. *Wingo,* there was a five-year delay and you have to read the facts of the case to understand the reason for the delay. The situation there is not analogous to the situation in our case.

Mr. Buckley apparently wants to place the burden of the defendant to have the State move forward the indictment against my defendant. I don't believe that's what *Barker* v. *Wingo* says.

What Mr. Buckley fails to indicate to the Court is that the Courts have stressed that the preliminary burden is placed on the prosecutor's shoulders to insure the defendant that the case is brought to trial.

I might further add in *Barker* v. *Wingo*—the Court, while it sets forth the guidelines for the lower courts to follow, they specifically say that these are the only guidelines. You don't have to prove all four factors. If one factor is so overriding, you can dismiss the indictment just on that fact alone.

I contend that for twenty-three months the State did absolutely nothing to move this indictment. I believe that that is unreasonable and unless they can show some justification for it, my motion should be granted.

The Court: This matter comes before the Court by way of a motion to dismiss Indictment SGJ 16-73-1

It is suggested in the brief and the oral argument that the defendant was apprehended sometime on or about February 4, 1972.

Sometime in January of 1974, the defendant was advised that the Grand Jury had returned an indictment against him and some twenty-three months elapsed from the time of his arrest to the time of the notification of the indictment in the cause.

I fail to find in the moving papers that there was any claim of prejudice. Apparently there has been no demand

for dismissal of these charges until today, for the first time.

I take it that the thrust of your argument is that the twenty-three-month delay is a legitimate ground to dismiss such an indictment.

It seems to me that the Courts have said that the right to a speedy trial does apply to a defendant, or even an indictment that is returned within the Statute of Limitations.

But in cases such as this, it would seem to me that the test to be applied to determine whether or not there has been a denial of a right to what we refer to as a speedy trial, has occurred here.

You gentlemen have cited cases that you rely on, such as: *Barker* v. *Wingo,* 33 Federal Second 101, which was a case in 1973.

I am sure you are all aware of the criteria that the Court set down in that case, the balancing factors, the various factors pertaining to delay.

All I can say, until there is some delay which is prejudicial, there is no necessity for inquiry into the other factors.

I think you must also consider the nature of the events involved. A delay that can be tolerated for example in an ordinary street event is considerably less than for a serious complicated charge. It seems to me in this particular case the twenty-three month-delay required the Court to inquire what some of the facts are.

I would suggest, Mr. Goldman, it seems to me from what you said, that the obligation, it's the defendant's

obligation to demonstrate to the Court's satisfaction that he was prejudiced if any at all, that the delay has caused. That to me is what they said in the *Barker* v. *Wingo* case. I would also refer you to the *Roundtree* case where it dealt with a defendant's rights because of delay. Those are the items I am talking about.

I don't believe the defendant in this case has shown any prejudice and, therefore, this must weigh against the defendant.

The other factors that the Court must consider is the reason for the delay.

I think the Courts have said there are other types of delay, if there was a deliberate attempt by the prosecution that would weigh heavily against the State? Was it mutual? Was it a natural result of the crowded court's trial calendar? This, too, is an obligation with the State. Or maybe the other factor, or the criteria, the availability of the witnesses, items such as that.

I have heard little or no reason for the delay.

I have given considerable weight to the defendant himself. He has not indicated in any fashion whatsoever that he ever asserted these rights until this morning. This weighs heavily against the defendant.

So for the reasons that I have advanced in this judgment, I therefore will deny your motion at this time. Motion for dismissal is denied.

APPENDIX D

Indictment

(Filed—December 5, 1973)

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—CRIMINAL

State Grand Jury Number SGJ16-73-1

Docket Number S-1705-73

STATE OF NEW JERSEY,

v.

JOSEPH G. SZIMA.

COUNT I

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that

JOSEPH G. SZIMA

between the 19th day of January, 1972, and the 4th day of February, 1972, at the City of Garfield, in the County of Bergen, and within the jurisdiction of this Court, did knowingly, willfully and unlawfully make and take what is commonly known as a book on the running, pacing and

trotting of horses, mares and geldings, contrary to the the provisions of N.J.S. 2A:112-3 and against the peace of this State, the government and dignity of the same.

COUNT II

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that

JOSEPH G. SZIMA

between the 19th day of January, 1972, and the 4th day of February, 1972, at the City of Garfield, in the County of Bergen, and within the jurisdiction of this Court, did knowingly engage as a messenger, clerk and copyist, and did work for the business of lottery or lottery policy, so-called, in and about premises at 125 JoAnn Terrace, in the City of Garfield aforesaid, where lottery slips and copies of numbers were kept and used in connection with the business of lottery or lottery policy, so-called, contrary to the provisions of N.J.S. 2A:121-3(a), and against the peace of this State, the government and dignity of the same.

COUNT III

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that

JOSEPH G. SZIMA

on the 4th day of February, 1972, at the City of Garfield, in the County of Bergen, and within the jurisdiction of

Appendix D

this Court, did unlawfully and knowingly have in his possession papers, documents, slips and memoranda pertaining to the business of lottery or lottery policy, so-called, contrary to the provisions of N.J.S. 2A:121-3(b), and against the peace of this State, the government and dignity of the same.

COUNT IV

The Grand Jurors of and for the State of New Jersey, upon their oaths, present that

JOSEPH G. SZIMA

between the 19th day of January, 1972, and the 4th day of February, 1972, at the City of Garfield, in the County of Bergen, and within the jurisdiction of this Court, did knowingly, willfully and unlawfully keep a place, that is, premises known as 125 JoAnn Terrace, in the City of Garfield aforesaid, to which persons might resort for engaging in gambling, to wit, both the practice commonly known as lottery or lottery policy, so-called, and the making and taking of what is commonly known as a book on the running, pacing and trotting of horses, mares and geldings, contrary to the provisions of N.J.S. 2A:121-3(c) and N.J.S. 2A:112-3, respectively, and against the peace of this state, the government and dignity of the same.

EVAN WILLIAM JAHOS
Assistant Attorney General and Director of the Division of Criminal Justice

A TRUE BILL:

ROBERT E. MISNER,
Foreman

APPENDIX E

Order dated April 26, 1974

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—CRIMINAL

Indictment No. SGJ 16-73-1
Criminal Action

STATE OF NEW JERSEY,
Plaintiff,

v.

JOSEPH G. SZIMA,
Defendant.

Application having been made by Harold Goldman, Esq., attorney for the defendant and in the presence of William F. Hyland, State Attorney General, Charles R. Buckley, Deputy Attorney General, appearing, for an Order dismissing the above-entitled indictment on the basis that the defendant had been denied his Sixth Amendment right to a speedy trial;

And the Court having read and considered the papers filed in support of the Motion, and having heard and considered the arguments of respective counsel, and the Court

Appendix E

being of the opinion that the application is without merit and should be denied;

It is on this 26th day of April, 1974;

Ordered that the application to dismiss the above-mentioned indictment on the basis that the defendant had been denied his Sixth Amendment right to a speedy trial be, and the same is hereby Denied.

Fred C. Galda,
J.S.C.

APPENDIX F

Order dated May 30, 1974

Superior Court of New Jersey
Appellate Division

Docket No. AM-405-73

Motion No. M-1558-73

Before Part D

Judges
Kolovsky
Fritz
Crane

State of New Jersey,

v.

Joseph G. Szima.

Moving Papers Filed May 9, 1974
Answering Papers Filed May 28, 1974
Date Submitted to Court May 29, 1974
Date Decided May 30, 1974

Appendix F

ORDER

This matter having been duly presented to the Court, IT IS HEREBY ORDERED as follows:

Motion for Leave to Appeal Denied

Supplemental:

For the Court:

HAROLD KOLOVSKY
P.J.A.D.

WITNESS, the Honorable HAROLD KOLOVSKY, Presiding Judge of Part D, Superior Court of New Jersey, Appellate Division, this 30th day of May, 1974.

ELIZABETH MCLAUGHLIN
Clerk of the Appellate Division

Supreme Court, U. S.
FILED
SEP 22 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-207

JOSEPH G. SZIMA,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE	1
REASONS FOR DENYING CERTIORARI—The Supreme Court of New Jersey decided the instant matter fully in accord with well-settled principles established by this Court; and, therefore, no reason exists for a grant of certiorari	4
CONCLUSION	10

Cases Cited

Arrant v. Wainwright, 468 F.2d 677 (5th Cir. 1972)	9
Barker v. Wingo, 407 U. S. 514 (1972)	3-6, 7-9
Commonwealth v. Pearson, 450 Pa. 467, 303 A. 2d 481 (1973)	9
Davis v. Ward, 400 U. S. 1203 (1970)	10
Dillingham v. United States, 423 U. S. 64 (1975)	7, 9
Klopfer v. North Carolina, 386 U. S. 213 (1967)	6
McIntyre v. State, 17 Md. App. 526, 302 A. 2d 672 (Ct. Spec. App. 1973)	9
Moore v. Arizona, 414 U. S. 25 (1973)	6, 9
Panama Canal v. Grace Lines, Inc., 353 U. S. 368 (1957)	10
People v. Artonio, 42 A.D. 2d 716, 345 N.Y.S. 2d 670 (1973)	9
People v. White, 32 N.Y. 2d 343, 345 N.Y.S. 2d 513, 298 N.E. 2d 659 (1973)	9

	PAGE
Smith v. Hooey 393 U. S. 374 (1969)	6
State v. Lisk, 25 N.C. App. 659, 214 S.E. 2d 315 (Ct. App. 1975)	9
State v. Morris, 501 S.W. 2d 39 (Mo. Sup. Ct. 1973)	9
State v. Szima, 133 N. J. Super. 469, 337 A. 2d 393 (App. Div. 1975)	3, 7
Strunk v. United States, 412 U. S. 434 (1973)	9
United States v. Fairchild, 526 F. 2d 185 (7th Cir. 1975), cert. den. —— U. S. ——, 96 S. Ct. 1682 (1976)	8
United States v. Lockett, 526 F. 2d 1110 (7th Cir. 1975)	4, 8
United States v. Marion, 404 U. S. 307 (1971)	5
United States v. Toy, 482 F. 2d 741 (D. C. Cir. 1973)	9

Statutes Cited

N. J. Stat. Ann. §2A:112-3	2
N. J. Stat. Ann. §2A:121-3(a)	2
N. J. Stat. Ann. §2A:121-3(b)	2
N. J. Stat. Ann. §2A:121-3(c)	2

Rule Cited

New Jersey Court Rule 3:25-3	7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-207

JOSEPH G. SZIMA,
Petitioner,

vs.

STATE OF NEW JERSEY,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

In January 1972, the State conducted Court authorized wiretaps of conversations between petitioner and other persons. The conversations indicated that petitioner was

involved in illegal bookmaking and other gambling activities. Petitioner was arrested on February 4, 1972, after a search executed pursuant to a warrant revealed that he was also in possession of gambling paraphernalia at his home.

Thereafter, on February 11, 1972, petitioner waived his right to a preliminary hearing. On December 5, 1973, the New Jersey State Grand Jury returned a four count indictment charging petitioner with: (1) bookmaking, in violation of *N. J. Stat. Ann.* §2A:112-3; (2) working for an illegal lottery, in violation of *N. J. Stat. Ann.* §2A:121-3(a); (3) possession of lottery paraphernalia, in violation of *N. J. Stat. Ann.* §2A:121-3(b); and (4) maintaining a lottery on his premises, in violation of *N. J. Stat. Ann.* §2A:121-3(c).

Petitioner moved for dismissal of the indictment on April 19, 1974. At the hearing petitioner contended that the time between arrest and indictment was sufficient to trigger a speedy trial claim and that the indictment should be dismissed since the State had failed to offer an explanation for the 23-month period. Although petitioner conceded that he had suffered no prejudice as a result of the time period involved and, also, that he had made no attempts to bring the matter to a speedy disposition, he, nevertheless, contended that his rights under the Federal Sixth Amendment had been infringed.

The State acknowledged the fact that it had no reasons that would justify the time lapse. The delay was the result of inadvertence on the part of State officials who were responsible for presenting the matter to a grand jury. The State conceded that although there was a huge backlog of cases awaiting grand jury action, priorities based upon the date of arrest should have been assigned. Nevertheless the prosecutor's failure to establish such priorities

was not designed to impair the rights of the accused. Further, the State argued that the time lapse did not rise to the level of a speedy trial violation under the balancing test enunciated in *Barker* v. *Wingo,* 407 U.S. 514 (1972). Additionally, the State adduced facts demonstrating that petitioner did not suffer any prejudice. The waiver of a preliminary hearing and petitioner's inaction regarding his right to a speedy trial were indicia of his lack of prejudice. The court then denied petitioner's motion.

On June 24, 1974, petitioner was tried and convicted on Counts I, II and IV. At trial, defense counsel conceded that in effect, petitioner admitted his guilt on the charges. He noted that he was proceeding with the formalities of trial solely to preserve his right to appeal. In order to expedite matters, petitioner waived his right to a jury and stipulated the admissibility and propriety of the State's evidence. That evidence consisted of tapes of the wiretaps and the gambling paraphernalia. Suffice it to say, the State's proofs were overwhelming. As noted, the court convicted petitioner of three counts and acquitted him on one.

On July 26, 1974, the Honorable Thomas S. O'Brien, J.S.C., sentenced petitioner to three concurrent terms of from one year to fifteen months in New Jersey State Prison. The court agreed with both parties that petitioner should be treated as though he had pleaded guilty, for sentencing purposes, since his *pro forma* trial transpired solely to protect his speedy trial rights.

On April 22, 1975, the Superior Court of New Jersey, Appellate Division reversed petitioner's conviction, ruling that his federal right to a speedy trial had been denied. *State* v. *Szima,* 133 N.J. Super. 469, 337 A.2d 393 (App. Div. 1975) (per curiam).

The Supreme Court of New Jersey then granted the State's petition for discretionary review. 68 N.J. 170, 343 A.2d 457. On May 17, 1976, the court reversed, reinstating the judgment of conviction. 70 N.J. 196, 358 A.2d 773. The court essentially held that the Appellate Division misapplied the test of *Barker* v. *Wingo, supra.*

Thereafter, petitioner received a stay of execution from the New Jersey Supreme Court which expired on or about August 11, 1976. Stays pending action on the instant petition were denied by Mr. Justice Brennan and Mr. Justice Marshall.

REASONS FOR DENYING CERTIORARI

The Supreme Court of New Jersey decided the instant matter fully in accord with well-settled principles established by this Court; and, therefore, no reason exists for a grant of certiorari.

Petitioner's sole claim is that the Supreme Court of New Jersey incorrectly judged this case's facts within the framework of *Barker* v. *Wingo, supra.* Briefly, *Barker* rejected the concept that the federal right to a speedy trial could be reduced to a *per se* formula. Four basic criteria were posited instead. The length, reason for, prejudicial effect of delay, and the defendant's assertion of his right to a speedy trial were said to create a framework within which a balance must always be struck. *Barker* v. *Wingo, supra,* 407 U.S. at 530-33. This Court also noted that other circumstances might of need be part of the equation. *Id.* at 533.[1] *Barker,* though, did more

[1] This Court did not explain what those circumstances might be. Conceded guilt, however, was accepted as one such circumstance by a federal Court of Appeals. See *United States* v. *Lockett,* 526 F.2d 1110, 1111-12 (7th Cir. 1975). If conceded guilt is a relevant consideration, then petitioner's current claim is asserted from a position of weakness; he has conceded his guilt throughout these proceedings.

than merely establish the relevant analytical mode. In discussing the various factors, this Court provided necessary guidance for evaluation of speedy trial claims.

The length of delay, according to *Barker,* "is to some extent a triggering mechanism." *Id.* at 530. The delay must be "presumptively prejudicial", else "there is no necessity for inquiry into the other factors that go into the balance." *Id.* *Barker* noted that the time lapse in each case must be viewed in its own "peculiar circumstances." *Id.* at 530-31.

The reason for delay was the next factor noted. *Barker* framed this as "the reason the government assigns to justify the delay." *Id.* at 531. The Court delineated three distinct categories of reason for delay. First, "[a] deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government." *Id.* Accord, *e.g., United States* v. *Marion,* 404 U.S. 307, 325 (1971). However, the Court noted a second consideration that, "[a] more neutral reason such as negligence should be weighted less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than the defendant." 407 U.S. at 531. Last, a valid reason for delay, such as unavailable witness, serves to justify appropriate delay. *Id.*

The third balancing criterion is whether or not a defendant asserts his right. Even so, it must be remembered that this Court declared unconstitutional demand-waiver rules. *Id.* at 528-529. Thus, the failure to move for a speedy trial is not dispositive by itself. Nonetheless, a defendant's assertion of right was said to be "closely related" to the other criteria. *Id.* Specifically, the strength of a defendant's efforts to assert his right to a speedy trial "will be affected by the length of the delay, to some

extent by the reason for the delay, and most particularly, by the personal prejudice, which is not always readily identifiable, that he experiences." *Id.* Realistically, "[t]he more serious the deprivation, the more likely a defendant is to complain." *Id.* at 531. For that reason, the fact of the assertion *vel non* is important in determining the deprivation of right. *Id.* This Court felt compelled explicitly to "emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." *Id.* at 531-32.

The fourth criterion isolated in *Barker* is prejudice to the defendant. The Court identified three forms of prejudice to defendants which flow from delays in disposition of pending charges. Pretrial incarceration, anxiety to the accused and the impairment of the defense are all to be evaluated in judging a speedy trial claim. *Id.* at 531-32. See, *e.g., Smith* v. *Hooey,* 393 U.S. 374, 377-78 (1969); *Klopfer* v. *North Carolina,* 386 U.S. 213, 221-22 (1967). See also *Moore* v. *Arizona,* 414 U.S. 25 (1973). Of these, however, impairment of the defense was, obviously, the most serious "because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Barker* v. *Wingo, supra,* 407 U.S. at 532.

In concluding its analysis, this Court observed that it considered "none of the four factors identified above as either a necessary or sufficient condition to the findings of a deprivation of the right of a speedy trial." *Id.* at 532. No single factor has "talismanic qualities". *Id.* Rather, "courts must still engage in a difficult and sensitive balancing process." *Id.* at 533.

It is, therefore, against the backdrop of the *Barker* v. *Wingo* balance that the New Jersey Supreme Court's decision must be judged. The New Jersey court meticulously examined petitioner's claim with heavy reliance on *Barker.* First, there has been no dispute that the 23-month delay between arrest and indictment of need triggered *Barker* analysis; and, the court so held, relying on *Dillingham* v. *United States,* 423 U.S. 64 (1975). *State* v. *Szima, supra,* 70 N.J. at 202, 358 A.2d at 776.

As to the reason for delay, the court simply wrote that "[i]t should not have happened." *Id.* at 358 A.2d at 777. Respondent has never sought to excuse its delay and has admitted that the delay was the result of an inadvertent oversight by members of the New Jersey Attorney General's Office. The New Jersey Supreme Court, however, did not chastise respondent for this oversight. By implication, then, the court correctly deemed this negligence to be a "more neutral reason" within the *Barker* context. As noted, the delay resulted from a huge backlog of complex and important cases awaiting grand jury action and a concomitant oversight in assignment of priorities to those cases. In no way did respondent attempt purposely to impair petitioner's defense.

Likewise, the court found that petitioner had failed to assert his rights. 70 N.J. at 202, 358 A.2d at 776. Although petitioner contended, and the Appellate Division agreed, that he could not have asked to be indicted, the Supreme Court found that other viable mechanisms to assert speedy trial rights were present in New Jersey procedures. Compare 70 N.J. at 202, 358 A.2d at 776, with 133 N.J. Super. at 473, 337 A.2d at 395. Specifically, the supreme court found that petitioner could have utilized *New Jersey Court Rule* 3:25-3 to move for dismissal of the complaint. *Id.* The court, therefore, held that petitioner could have asserted his right to a speedy trial by moving for dismissal but did not. *Id.*

Finally, and of utmost importance, the court found that petitioner was in no way prejudiced by the delay. He

"was not subjected to lengthy pretrial incarceration." 70 N.J. at 202, 358 A.2d at 776. In fact, petitioner was never incarcerated until post-decision stays granted by the New Jersey Supreme Court expired. Also, petitioner "claim[ed] no impairment of his ability to defend." *Id.* at 202, 358 A.2d at 777. In fact, the sole intimation of prejudice here is petitioner's contention that the New Jersey court "completely failed to take into consideration the inherent prejudice an accused encounters." (Pb11). Additionally, he cites language from one of the dissents below which notes petitioner's personal situation and then uncritically assumes that his "vulnerability to prejudice is apparent." (Pb12). Nevertheless, petitioner has never demonstrated that he has, in any way, been prejudiced, nor do any indications of anxiety, or even concern, manifest themselves in the record.

From the foregoing, it is eminently clear that the Supreme Court of New Jersey did nothing improper in weighing each of the *Barker* v. *Wingo* factors. To the contrary, the court balanced all the relevant criteria to rectify the disequilibrium created by the intermediate appellate tribunal. All that petitioner contends is that the Court established a demand waiver rule and failed to account properly "inherent prejudice to an accused." Yet, respondent's exposition of the decision demonstrates that the court did not establish such a rule but engaged in the sensitive balancing demanded by *Barker*.

Further, where a lengthy delay is caused by prosecutional inadvertence, but where a defendant fails to assert his rights and suffers no prejudice, courts generally have held that no speedy trial violation has occurred under *Barker* v. *Wingo, E.g., United States* v. *Lockett,* 526 F.2d 1110, 1111-12 (7th Cir. 1975); *United States* v. *Fairchild,* 526 F.2d 185, 187 (7th Cir. 1975), *cert.* den. —— U.S. ——, 96 S. Ct. 1682 (1976) (20-month delay between arrest

and indictment); *United States* v. *Toy,* 482 F.2d 741 (D.C. Cir. 1973); *Arrant* v. *Wainwright,* 468 F.2d 677 (5th Cir. 1972); *McIntyre* v. *State,* 17 Md. App. 526, 302 A.2d 672 (Ct. Spec. App. 1973); *State* v. *Morris,* 501 S.W.2d 39 (Mo. Sup. Ct. 1973); *People* v. *Artonio,* 42 A.D.2d 716, 345 N.Y.S.2d 670 (1973); *State* v. *Lisk,* 25 N.C. App. 659, 214 S.E.2d 315 (Ct. App. 1975); *Commonwealth* v. *Pearson,* 450 Pa. 467, 303 A.2d 481 (1973). But see *People* v. *White,* 32 N.Y.2d 343, 345 N.Y.S.2d 513, 298 N.E.2d 659 (1973) (52-month delay too long). Consequently, the Supreme Court of New Jersey merely joined a consensus when it decided the instant case.[2]

Moreover, it is evident that petitioner's position, if advanced to its logical conclusion, would establish a *per se* dismissal rule where delay has been caused by prosecutorial negligence or inadvertence. Such would be totally contrary to this Court's directions in *Barker* v. *Wingo.* A grant of *certiorari* and subsequent decision could only serve to disorder settled legal principles which have recently been reaffirmed. See, *e.g., Dillingham* v. *United States, supra; Moore* v. *Arizona,* 414 U.S. 25 (1973); *Strunk* v. *United States,* 412 U.S. 434 (1973).

In view of the foregoing, respondent submits that *certiorari* should not be granted. Petitioner has failed to demonstrate any constitutional infirmity in the opinion of the Supreme Court of New Jersey which requires review

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[2] Respondent assumes *arguendo* that by "inherent prejudice" petitioner would engage this Court's statement that "even if an accused is not incarcerated prior to trial, he is still disadvantaged by restraints on his liberty and by living under a cloud of anxiety suspicion and often hostility." *Barker* v. *Wingo, supra,* 407 U.S. at 533. Petitioner has failed to disclose whether or not he experienced such "inherent prejudice"; and if he did, his failure to mention it must evidence its minimal effect on his life.

in the interest of justice. Likewise, petition has failed to present any substantial federal question. Therefore, there is no merit to petitioner's request for review. See, *e.g.*, *Davis* v. *Ward,* 400 U.S. 1203 (1970); *Panama Canal* v. *Grace Lines, Inc.,* 353 U.S. 368 (1957).

CONCLUSION

For the reasons herein, it is respectfully urged that the Writ of Certiorari should be denied.

Respectfully submitted,

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